

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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ELLEN M. PECK,

Plaintiff,

-against-

PUBLIC SERVICE MUTUAL
INSURANCE COMPANY,

Defendant.

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: No. 3:03CV2027 (GLG)

ORDER

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This case was removed from State Court by Defendant based upon the diversity of citizenship of the parties, Plaintiff being a citizen of the State of Connecticut and Defendant being a New York corporation with its principal place of business in New York. Plaintiff has objected to the removal and has requested a remand to state court on the ground that this is a "direct action," brought pursuant to Conn. Gen. Stat. § 38a-321, and under 28 U.S.C. § 1332(c)(1), Defendant insurance company is deemed a citizen of the State of which its insured is a citizen, i.e., Connecticut. Thus, complete diversity of citizenship between the parties is lacking, see 28 U.S.C. § 1332(a), and the case should be remanded.

In Rosa v. Allstate Ins. Co., 981 F.2d 669 (2d Cir. 1992), the Second Circuit held that reference to "direct action statute" in § 1332(c)(1) applies only to cases in which the injured party is entitled to bring suit against the tortfeasor's liability insurer without joining the insured or first obtaining a judgment

against the tortfeasor. The purpose of the 1964 amendment to § 1332(c), which added the "direct action" language, was to eliminate diversity jurisdiction where both the injured party and tortfeasor were local residents, but because of a state's direct action statute, the claim could be brought against the insurer without joining the local tortfeasor as a defendant. Rosa, 981 F.2d at 674. Here, Plaintiff already has obtained a judgment against the insured and has brought this suit as the judgment creditor and subrogee of the insured.

In Bourget v. Government Emp. Ins. Co., 313 F. Supp. 367, 370-71 (D. Conn. 1970), a case factually similar to the instant case, this Court held that an action by an injured truck driver as judgment creditor and his employer's compensation carrier judgment against the tortfeasor's insurer was not a "direct action" under § 1332(c)(1). "[A]s the legislative history and subsequent cases make clear, § 1332(c) applies only to those limited 'direct actions' and not to 'all actions' brought against an insurer in which its insured is not joined as a defendant." 313 F. Supp. at 370. The Court noted that this provision had been held inapplicable in diversity actions where the plaintiff first successfully sued the tortfeasor and then instituted a subsequent action against the tortfeasor's insurer. Id. at 371 (citing Cunningham v. State Farm Mutual Auto. Ins. Co., 297 F. Supp. 1138 (E.D. Tenn. 1969)). The Court concluded that "unless

the cause of action urged against the insurance company is of such a nature that the liability sought to be imposed could be imposed against the insured, that the action is not a direct action." Id.

In that case, like the instant case, the plaintiff sought to impose duties upon the insurer because of a contractual liability assumed by it, which could not be asserted against the tortfeasor. Thus, the Court held that it was not a direct action. Id.; see also Stockton v. General Accident Ins. Co., 897 F.2d 530, 1990 WL 20477 (6th Cir. 1990) (unpublished disposition) (holding that a judgment creditor's suit against an insurer is not a "direct action" within the meaning of § 1332(c)); Fortson v. St. Paul Fire & Marine Ins. Co., 751 F.2d 1157 (11th Cir. 1985) (holding that a bad faith action by a third-party claimant against an insurance company was not a "direct action"); Hayes v. Pharmacists Mut. Ins. Co., 276 F. Supp. 2d 985 (W.D. Mo. 2003) (holding that a garnishment action by a judgment creditor, who prevailed on underlying action against insured, against the insurer was not a "direct action" within the meaning of § 1332(c)); Freeman v. Walley, 276 F. Supp. 2d 597 (S.D. Miss. 2003) (holding that injured vehicle passenger's garnishment action against the tortfeasor's insurer to recover on a default judgment was not a "direct action" under § 1332(c)); but see Wheelwright Trucking Co. v. Dorsey Trailers, Inc., 158 F. Supp. 2d 1298 (M.D.

Ala. 2001) (holding that judgment creditor's garnishment action against judgment debtor was a "direct action").

Based on the authority of Rosa and Bourget, we hold that the direct action provisions of 28 U.S.C. § 1332(c) do not apply to this case. Accordingly, Defendant's removal of this action to federal court based on the complete diversity of the parties was proper. Plaintiff's objection to removal is overruled and her request for remand is denied [Doc. # 7].

SO ORDERED.

Date: May 6, 2004.
Waterbury, Connecticut.

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GERARD L. GOETTEL,
United States District Judge